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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

POLICARPOS RAMANTANIN,

Petitioner,

—against—

DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Policarpos Ramantanin, the petitioner herein, prays for a writ of certiorari to review the final order of the Court of Appeals of the State of New York.

The Opinion Below

The opinion of the Supreme Court of the State of New York, New York County, Special Term, Part I, was published in the New York Law Journal, dated December 2, 1963 (not otherwise reported). Appendix p. 5a.

The affirmance of the order of Special Term by the Appellate Division of the Supreme Court, First Judicial Department, was reported without opinion in 29 A.D. 2d 634; 286 N.Y.S. 2d 454. Appendix p. 4a. Leave to reargue denied, Appendix p. 2a.

The denial by the Court of Appeals of petitioner's motion for leave to appeal to such court from the order of affirmance of the Appellate Division is reported at 22 N.Y.2d 644. Appendix p. 1a.

("R" references are to pages of the record used in the New York courts.)

Jurisdiction

The final order of the Court of Appeals of the State of New York was made on July 2, 1968. Appendix p. 1a

No application has been made for an order extending the time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3). Certiorari is sought on the ground that the New York Court of Appeals and the courts below have decided important federal questions of substance not heretofore determined by this court and/or decided the same in a manner probably not in accord with the applicable decisions of this Court.

Questions Presented

Whether a police lieutenant of the competitive civil service of the City of New York was deprived of his constitutional rights to equal protection and due process when the Department of Personnel ignored its own rules and conducted, without prior notice, a forbidden closed hearing, ostensibly to consider the merits and demerits of its answers to a competitive multiple choice written examination for promotion, with the elicited testimony and documentary evidence never disclosed fully to the petitioner or to the courts as required by the Civil Practice Act, Sec. 1291 (Civil Practice Law and Rules 7804(e)).

Whether petitioner was denied procedural due process when the courts below failed to grant him a jury trial as provided by statute under the Civil Practice Act 1295 (Civil Practice Law and Rules 7804(h)) and as demanded in the Notice of Motion (R. 5) and the petition (R. 48).

Constitutions, Statutes and Rules

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any State deprive any person of . . . property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York State Constitution, Article 5, Section 6:

> "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive."

Civil Practice Act:

> § 1291. Answer
>
> At least two days prior to the return day, unless a different time is fixed in the order to show cause, the respondent shall serve upon the petitioner, and file with the clerk of the court, a verified answer. The answer must contain proper denials and statements of new matter, as in an action, and must set forth such facts as may be pertinent and material to show the grounds of the action taken by the respondent which is complained of; but it may not contain a counterclaim. The respondent shall annex to the answer filed with the clerk of the court a certified transcript of the record of proceedings subject to review or consideration. * * * The respondent shall also serve and submit with the answer affidavits, made by a person having knowledge of the facts, or other written proof, showing such evidentiary facts as shall entitled him to a trial of any issue of fact.

Civil Practice Law and Rules,* Sec. 7804(e):

"The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration. . . ."

"Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner."

Civil Practice Act, Sec. 1295:

"§ 1295. Hearing upon the application. Upon the return day of the application, if no triable issue of fact is duly raised by the pleadings and accompanying papers, the court shall forthwith render such final order as the case requires. If a triable issue of fact is duly raised, it shall be forthwith tried before a court sitting without a jury, before a referee, or, where the proceeding is to review a determination or to compel performance of a duty specifically enjoined by law and a jury trial is demanded on or before the return day, before a court and a jury. The provisions of statute or rule governing references in an action shall apply to the proceeding under the article. * * *"

Cf present Civil Practice Law and Rules

Sec. 7804.

"(h) Trial. If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith. * * *"

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* Effective September 1, 1963, Laws 1962 Chapter 308. The initial proceeding was commenced April 19, 1962.

See 8 Weinstein-Korn-Miller, New York Civil Practice, par. 7803.10, p. 75-52.

Department of Personnel—Rule 4.4.4:

> "The Director may secure outside expert assistance in examining in such cases as he may deem appropriate and necessary, however, any person who is a public officer or employee of the City in the classified service thereof shall be ineligible to render such assistance."

Department of Personnel—Rule 4.4.6:

> "* * * such examination shall otherwise be free from the influence or participation, in any manner, of the appointing officer or of his subordinates."

Facts Material to a Consideration of the Case

The petitioner, a citizen, World War II veteran, attorney and lieutenant in the police department of the City of New York, participated in a competitive, written examination of the multiple choice type, for promotion to captain; he duly and unsuccessfully protested to Personnel, its denial of credit for certain answers selected by him in conformity with Personnel's sole requirement regarding selection of choices: 'select that answer which you believe to be the acceptable one among the choices listed . . .' (R. 6).

Petitioner then sought to review the determination of Personnel in failing and refusing to give credit for and in rating his answers, and, pursuant to Article 78 of the Civil Practice Act relating to causes in the nature of mandamus and certiorari proceedings, instituted a proceeding by Notice of Motion and Petition. The petitioner requested a trial by jury (Notice of Motion (R. 5) and Petition (R. 48). The petition was dismissed.

Personnel's answer, made under oath, also contained appended thereto certain analyses (R. 56-77) of the answers in dispute composed of unsworn statements by unidentified persons and the admission that Personnel did meet with an official of the appointing body, i.e., the police department and that there was agreement "For the most part" (R. 52); had the petitioner been accorded a trial by jury, as demanded, these analyses would have been inadmissible as evidence.

Manner in Which Federal Questions Sought to be Reviewed Were First Raised

The federal questions sought to be reviewed were first raised in the petition (R. 11) to the court of first instance, the Supreme Court of the State of New York, County of New York, Special Term, Part I; asserted in his brief to the Appellate Division and again asserted in his brief to the Court of Appeals.

Argument Relied Upon for Allowance of the Writ

The Right to a Jury Trial

The value to the petitioner of the right to cross-examine witnesses, to examine documentary evidence and to explain or rebut the elicited evidence is a right so elemental that citation of authority is unnecessary. Here, the statutory right to a trial must be protected by the constitution, for, without it, cross-examination can not be had, and a denial of cross-examination is a denial of due process.

Police employment, under New York and federal constitutional law, is a right. Due process in adjudicatory proceedings for the determination of rights requires advance notice of a hearing and an opportunity to confront and cross-examine one's opponents and there is nothing here, either in the nature of the proceeding or the interest

to be protected by the city which warrants a departure from these rules.

No case has been found asserting that notice of hearing, confrontation or cross-examination may be dispensed with in police promotion cases or that petitioner may be denied the requested trial by jury guaranteed him by statute (CPLR 7804(h)). The record here demonstrates that Personnel did attach evidential weight to information elicited at the forbidden hearing, consequently, the information met the test of relevancy—the sole test decisive of whether such evidence should be disclosed to the petitioner. The right to a jury trial should be jealously guarded by the courts.

> *Jacob* v. *New York City,* 315 U.S. 752; 86 L. Ed. 1166; 62 S. Ct. 854.

In *Acosta* v. *Lang,* 13 N.Y.2d 1079; 246 N.Y.S.2d 404; 196 N.E.2d 60 (Art. 78, competitive civil service examination for police promotion, N.Y.C. Police Department; multiple choice answers in dispute) the New York Court of appeals directed:

> "a hearing to determine (the) . . . issue whether the answer given by the candidate on the test is better or at least as good as the key answer."

Agresti v. *Buscemi,* 28 A.D.2d 877; 281 N.Y.S.2d 853 (1967) (Art. 78, teacher);

Morrison v. *Hoberman,* 28 A.D.2d 978; 283 N.Y.S. 2d 1013 (1967) (Art. 78, civil service, N.Y.C.);

Caruso v. *Inc. Village of Sloatsburg,* 28 A.D.2d 679; 280 N.Y.S.2d 683 (1967) (Art. 78, public works employee).

In his article, "A Decade of Administrative Law", Michigan Law Review, April 1953, Vol. 51, No. 6, Professor Bernard Schwartz states at pages 804-5:

> "If an administrative agency is exercising a function which is judicial in nature, one starts with the assumption that those affected must be given notice and an opportunity to be heard. 'It is also elementary in our system of law', the Court of Appeals, District of Columbia, has stated, 'that adjudicatory action cannot validly be taken by any tribunal whether judicial or administrative except upon a hearing wherein each party shall have opportunity to know of the claim of his opponent; to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf and to make arguments. This is a requirement of the due process clause of the Fifth Amendment to the Constitution.' Philadelphia Co. v. The Security Exchange Commission (D.C. Cir. 1948), 175 Fed. 2d 808 at 817."

This case confronts the Court with a new aspect of the problem of the individual and his government. Here, administrative decisions have been challenged because of the possibility that the city agency may have derived some advantages from a forbidden hearing. Petitioner asserts that what the agency heard or failed to hear (and failed to reveal) might be helpful to him in his case; the testimony, relevant as it was, would clearly be probative and proper for jury consideration.

The decisions affecting the choices and the interpretation of Personnel's instructions is challenged because all the courts below, in effect, permitted Personnel to suppress the evidence it had illegally obtained and to deprive the petitioner of its use.

By analogy, where the victim of eavesdropping asserts that its fruits may have been used against him, the Court has held him entitled to full exploration at his trial of the extent to which the case against him may have been derived from the government's misconduct. *O'Brien* v. *U. S.*, 386 U.S. 345; 87 S. Ct. 1158; 18 L. Ed. 2d 94.

One may not ignore the salient principle that neither courts nor administrators are permitted to frustrate the production of evidence which is relevant and may help the petitioner.

Personnel admits the hearing held; but it refuses to disclose the details of the information elicited.

Petitioner submits that a sentence of guilty in a criminal case where there was such a withholding of evidence would be summarily reversed by any reviewing authority.

The decision below permits the continuation of a generally surreptitious and privileged practice of ex parte access by the examining body to the appointing body concerning the merits of Personnel's position—a practice forbidden by Personnel's rules.

Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on.

Presumed prejudice inheres in, and aroused suspicions result from an ex parte "consultation", conference or hearing because of its inconsistency with our adversary theory of civil litigation. Time and again this Court has said that Justice must not only be done, but must manifestly be seen to be done.

It is well settled that the refusal to supply data which meets the requirement of relevancy and to which an employee is entitled constitutes an unfair labor practice.

3 ALR 3d 880 (Union's Right to Information).

It was impossible for the court to have performed its task of reviewing the administrative decision when it was not informed of the evidentiary facts upon which Personnel relied in making its decision. Disclosure is the antidote to partiality and favor.

Matter of Community Synagogue v. *Bates*, 1 N.Y.2d 445, 454; 136 N.E.2d 488; 154 N.Y.S.2d 15.

Since Personnel acted upon facts peculiarly within its own knowledge as derived from the police department, it was required to disclose those facts in the return (CPA Sec. 1291).

Personnel comes before the court with ill grace when it deliberately and perhaps for strategic reasons withholds information that will aid the Court in finding the truth. It is the whole truth that is desired—not so much of it as it is felt (R. 52) strategically wise to offer. Personnel does not want the whole truth by presenting evidence within its knowledge and control. It is clear that the police official was responsive to Personnel's call and barred by policy and otherwise from revealing evidence peculiarly within its domain and not available elsewhere. No doubt there are records and reports of the information elicited. May the petitioner see this secret information?

To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.

Coe v. *Armour Fertilizer Works*, 237 U.S. 413; 35 S. Ct. 625; 59 L. Ed. 1027;

Rees v. *Watertown*, 19 Wall 107, 123; 86 U.S. 107; 22 L. Ed. 72.

The record should not be silent, particularly where, as here, Personnel admits there were points of agreement and disagreement. Petitioner does not ask this Court to pass on his qualifications for ultimate promotion to captain. This is of course a matter for determination by state authorities.

> "The return must include definite findings and may not be merely conclusory in form."
>
> *Hunter* v. *Saddle Rock,* 4 App. Div. 2d 961.

The pleadings and papers before the courts raised material, relevant questions of fact on the very issues on which the appeal was predicated. Personnel proceeded to conduct a hearing, forbidden by its own rules, and proceeded to a decision without according petitioner an opportunity to be present and without disclosing either to the court or to the petitioner the relevant information obtained.

In the past such hearings, when held, were presumably sub rosa and the elicited information was accordingly never revealed to the candidates—*e.g.,* new information that was significantly relevant and of controlling importance for it was peculiarly within the knowledge of the testifying police officials: who should know better the requirements and duties of the position of police captain than those who served in the rank and under whom the future captains must function?

Such procedure was unauthorized and unlawful and forms the basis for a denial of procedural due process.

> *Matter of Hecht* v. *Monaghan,* 307 N.Y. 461, 470; 121 N.E.2d 421 (1954, hack license).

It is hardly unique for an administrative body to prefer to lose a case rather than to disclose its facts or lack of facts.

Personnel must at least come forward with the facts by which its conclusions can be justified.

"An explicit statement of the evidentiary facts."

Holmes and Murphy v. *Bush,* 6 A.D.2d 200; 176 N.Y.S.2d 183.

The Right to Employment as a Police Captain is Property

The police department can not function without captains. They are a part of the law enforcement system of the City of New York. Hence, the city invites and encourages lieutenants to engage in the study for promotion and impliedly promises and agrees that if the person who accepts the invitation, participates successfully in the examination, and is not otherwise ineligible, will be promoted to and be employed as a police captain. The candidate, relying on these promises, spends years in school, pays tuition fees, buys books and necessarily is compelled to refrain from engaging in remunerative employment during the period of study, has thereby created a thing of value, i.e. property. The property loses all its value when a forbidden hearing is conducted, and when petitioner is denied his statutory right to a demanded trial by jury.

The right to government employment is a property right within the protection of the Federal and State Constitutions.

Wieman v. *Updegraff,* 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216;

United States v. *Lovett,* 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252;

Matter of Hamilton v. *Brennan,* 203 Misc. 536, 119 N.Y.S. 2d 83.

The arbitrary exclusion of a civil servant from state employment contravenes the due process clause of the Fourteenth Amendment. *Wieman* v. *Updegraff, ante.*

Admission to the promotional examination held by Personnel was earned by petitioner's service in the rank of lieutenant.

> "Those who are brought into contest with . . . Government . . . are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."
>
> *Morgan* v. *United States,* 304 U.S. 1, 18, 19; 82 L. Ed. 1129; 58 S. Ct. 999.

ibid, at 20:

> "the requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as the beginning and intermediate steps."

The State of New York must grant procedural due process to its employees:

In *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 102; 10 L. Ed. 2d 224; 83 S. Ct. 1175, this court noted:

> "A State cannot exclude a person from the practice of law OR FROM ANY OTHER OCCUPATION in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment" (Emphasis added).

and at 103:

> "We are not here concerned with grounds which justify denial of a license to practice law but only with what procedural due process requires if the license is to be withheld."

Schware v. *Board of Bar Examiners*, 353 U.S. 232, 238-9, 1 L. Ed. 2d 796, 77 S. Ct. 752;

Joint Anti-Fascist Committee v. *McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817;

Cafeteria & Restaurant Workers Union Local 473 v. *McElroy*, 367 U.S. 886, 895-96, 81 S. Ct. 1743, 6 L. Ed. 2d 1230.

In *Morgan* v. *United States, ante*, Mr. Chief Justice Hughes stated:

> "* * * The vast expansion of this field of administrative regulation in response to the pressure of social need is made possible under our system of adherence of the basic principle that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirement of fair play. These demand 'a fair and open hearing'—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard' (citing cases)."

The legislature has granted appellant the right to a trial by jury. Petitioner has a right to know the testimony adduced at the forbidden meeting.

Personnel may fear that full disclosure will in some unrevealed manner, penalize itself; that it is benefited when it continues to conceal. The spontaneous response of the man in the street, be he policeman or not, is that concealment hides Personnel's shame and guilt. Personnel masks not its face when it speaks the truth.

It is clear that where the testimony or documents submitted would support a conclusion either way Personnel (and the police official) would lean more heavily toward their own purposes.

Failure of an administrative body to give notice of evidence being considered by it, is sufficient reason for setting aside its determination.

Switsky v. *Herman*, 10 A.D. 2d 959.

The Right to Evidence

It is, we submit, offensive to principles of due process and fairness that the record upon which Personnel relied and asked the appellate courts to affirm the judgment of Special Term consists in major part of material not available to him.

The weed of improper government actvity and secrecy was permitted to blossom and choked out the petitioner's basic right to have access to the same officials or other current members of the police department, all barred by law and policy, from submitting affidavits in support of petitioner's position, yet made freely available to Personnel when it chose to ignore its own rules forbidding such conduct. However, such police testimony would be available to the petitioner through the compelling power of court process, at a jury trial.

This Court has, on many occasions, held that due process is denied where an administrative decision is based, in whole or in part, on evidence acquired by a private investigation of the administrator and such evidence is not made known to the parties with opportunity for explanation and rebuttal.

Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1936); 57 S. Ct. 724, 81 L. Ed. 1093;

United States v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963), 83 S. Ct. 1409, 10 L. Ed. 2d 652.

There is no question but that Personnel gave credence to, and relied upon the undisclosed and unproven material revealed at the hearing. In one instance, relying on the evidence elicited, Personnel deleted one question.

Moreover, the administrative record to be reviewed must be a proper record. In *Norris & Hirshberg* v. *Securities and Exchange Commission,* 85 App. D.C. 268, 163 F.2d 689, 693 (1947), certiorari denied, 333 U.S. 867 (1948), 68 S. Ct. 788, the court defined the proper content of the record as follows:

> "In considering a case such as this the Commission might have before it four sorts of documents: the pleadings, a transcript of the evidence, briefs of counsel, and memoranda prepared by members or subordinates. It is well established that only the pleadings and the evidence constitute the record upon which the decision must be based. Briefs and memoranda made by the Commission or its staff, are not parts of the record. Our duty on appeal, being only to say whether the record justifies the order, is therefore only to examine the pleadings and the evidence. What may be said by counsel in their briefs, or by a Commissioner or a subordinate in a memorandum concerning the record, does not properly come before us."

Personnel has failed to make adequate provision for a record that could be subjected to judicial scrutiny as required by Civil Practice Act Sec. 1291. Personnel made reference to evidence it relied upon in making its decisions which petitioner did not see or hear and which he had no opportunity to explain or refute.

Personnel characterizes the effect of this evidence as agreeing for the most part with its answers. We may conclude, therefore, that the evidence was relevant and, since there were 99 questions remaining, that the evidence

had a material bearing on more than 50 questions; and that all or part of the remaining 49 questions were in some way in disagreement.

When the agency making the decision relies on evidence that the petitioner has no chance to refute, the hearing becomes infected wtih a procedure that lacks that fundamental fairness the citizen expects from his government.

cf. *Willner* v. *Committee on Character & Fitness, ante.*

Since Personnel acted upon facts peculiarly within the knowledge of its members, it was required to disclose those facts in the return.

Community Synagogue v. *Bates, ante.*

There is unanimity of authority for the rule that Personnel must at least come forward with the facts by which its conclusion can be justified.

Personnel's rules implement the mandate of the New York Constitution that civil service promotions shall be by competitive examination. Therefore, it follows, that compliance with its own rules is no longer subject to the whim or caprice of Personnel; compliance presumptively nutures competition—that competition espoused by the New York State Constitution and enacted to benefit the petitioner and the people of New York.

The arbitrary exclusion of a civil servant from city employment as a police captain contravenes the due process clause.

Wieman v. *Updegraff, ante;*

Willner v. *Committee on Character & Fitness, ante.*

The Federal Questions Are Substantial

The issue presented is justiciable. A claim of a present right to promotion and a denial of that right is a controversy.

Sec. 7804(h), CPLR provides for a jury trial in an Article 78 proceding where there are issues of fact, as here, and a demand is made. Failure of the courts below to grant a jury trial as demanded violated the due process clause of the Fourteenth Amendment.

The plain purpose of the statute is to preclude the court from passing upon disputed questions of fact without formal trial.

The requirement, imposed upon Personnel by law, to permit all qualified police lieutenants to compete, carried with it the concomitant right of the petitioner, police lieutenant, to participate in the examination. The petitioner earns his livelihood by working for the police department. He has the right—if qualified—to compete for promotion—a right of which he may not be arbitrarily deprived.

The determinaton of the qualification of a policeman for promotion is an important governmental act, and such determination must be based upon facts sustained by substantial evidence after a fair investigation—where the evidence considered by Personnel is revealed and made part of the record for review by the courts; and, disclosed at a trial by jury as here demanded. This is in compliance with the constitutional process of due process of law, even

in situations where statutes and regulations do not specifically require such a hearing.

Morgan v. *United States, ante.*

In summary, petitioner contends that:

(1) Petitioner has a statutory right to a trial by jury and its denial is a denial of procedural due process. Special Term erred in not granting a trial by jury as demanded.

(2) Personnel in rendering its decision in this case relied on evidence and facts which were not disclosed to the courts or the petitioner with an opportunity for rebuttal. Petitioner has a right to see this evidence.

(3) The actions of Personnel and the courts deprived petitioner of his property without due process of law and denied him procedural due process and equal protection of the law. The right to employment as a police captain is property.

(4) Special Term in admitting the "Analyses" by undisclosed and unsworn persons who were under the control and supervision of Personnel acted contrary to established procedures and in conflict with applicable decisions of this Court.

(5) The Court of Appeals, by denying leave to appeal, without opinion, confirmed the judgment of the Appellate Division, which had, without opinion, confirmed the opinion of Special Term; therefore, the Court of Appeals must be assumed to have adopted and approved the actions of Special Term and the decisions and actions of Personnel.

The main issue here is the statutory right to a jury trial, and whether a denial of it, is a violation of petitioner's rights under the Fourteenth Amendment of the

United States Constitution. It is a question of broad, general interest to every policeman and law enforcement agent in the nation, and the public particularly when statutory rights of law breakers to jury trials are protected.

It is respectfully submitted that the Court has jurisdiction in this case, that the federal constitutional questions were properly raised and presented below and that the questions are so substantial as to merit plenary consideration by the Court.

The Court of Appeals of the State of New York, in its determination of the issues of due process and equal protection presented herein has not acted in accord with the decisions of this Court.

CONCLUSION

The writ of certiorari to the Court of Appeals of the State of New York should be granted.

Respectfully submitted,

POLICARPOS RAMANTANIN,
Attorney at law, pro se
c/o Milton Jacobowitz
1618 Central Avenue
Far Rockaway, New York 11691

A. Order of New York Court of Appeals Denying Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals, for the State of New York, held at Court of Appeals Hall in the City of Albany on the Second day of July, A. D. 1968.

Present, HON. STANLEY H. FULD, *Chief Judge, presiding.*

1... Mo. No. 466

POLICARPOS RAMANTANIN,

Appellant,

For an Order &c.

VS.

DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK,

Respondent.

A motion for leave to appeal to the Court of Appeals &c. in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same is denied.

A copy

GEARON KIMBALL
Deputy Clerk

[SEAL]

B. Order of Appellate Division Denying Leave to Reargue

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 28th day of March, 1968.

Present—HON. SAMUEL W. EAGER,
Justice Presiding,

" ARON STEUER,
" LOUIS J. CAPOZZOLI,
" GEORGE TILZER,
" OWEN MCGIVERN,
Justices.

M-3687

In the Matter of the Application of

POLICARPOS RAMANTANIN,
Petitioner-Appellant

for an order, etc.,

vs.

DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK,
Respondent-Respondent.

The above named petitioner-appellant having moved for leave to reargue his appeal from the order of the Supreme Court, New York County, entered on December 23, 1963, which order was unanimously affirmed by order of this Court entered on December 19, 1967, or, in the alternative, for leave to appeal to the Court of Appeals, and to amend the remittitur,

B. Order of Appellate Division Denying Leave to Reargue

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of Policarpos Ramantanin in support of said motion, and the affidavit of Stanley Buschbaum in opposition thereto, and after hearing Mr. Policarpos Ramantanin, appearing pro se, for the motion, and Mr. Stanley Buchsbaum

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

ENTER:

HYMAN W. GAMSO
Clerk

(Entered March 28, 1968)

C. Order of Affirmance of the Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 19th day of December, 1967.

Present—HON. SAMUEL W. EAGER,
Justice Presiding,

" ARON STEUER,
" LOUIS J. CAPOZZOLI,
" GEORGE TILZER,
" OWEN MCGIVERN,
Justices.

12509

POLICARPOS RAMANTANIN,
Petitioner-Appellant,

For an Order pursuant to Article 78 of the Civil Practice Law and Rules

—against—

DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK,
Respondent-Respondent.

An appeal having been taken to this Court by the petitioner-appellant from an order of the Supreme Court, New York County, entered on December 23, 1963, denying petitioner's application and dismissing the petition, and said appeal having been argued by Mr. Policarpos Ramantanin, pro se, and by Mr. William A. Marks, of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

HYMAN W. GAMSO
Clerk.

D. Opinion of Special Term

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM, PART I

HOFSTADTER, J.

This Article 78 proceeding concerns petitioner's answers to Part I of the written promotion examination for Police Captain held January 21, 1961. Part I consisted of one hundred multiple choice questions and each candidate was directed to select the answer he believed the acceptable one among four possible answers. Petitioner challenges the Key answers selected by the examiners of the Department of Personnel to twenty questions; and their failure to accept petitioner's answers to these questions.

The record contains substantial evidence that there were reasonable bases for the answers chosen by the examiners. The power of the court to review the action of the examiners in grading examination papers is properly a circumscribed one (Matter of Cavanagh v. Watson, 201 Misc. 899, aff'd 280 App. Div. 757). Absent demonstration that respondent's refusal to adopt petitioner's answers was an abuse of discretion or was patently wrong (CPLR 7803), the petition must fail (Gulotta v. Falk, 9 A.D. 2d 580). No such demonstration was made here.

This court may not intervene to resolve a difference of opinion when the choice of the examiners was objectively based on technical authority (Robinson v. McNamara, 99 N.Y.S. 2d 840, aff'd 275 App. Div. 918; Matter of Blumenthal v. Morton, 273 App. Div. 497; Matter of Immediato v. Kern, et al., 254 App. Div. 672, aff'd 278 N.Y. 680), for we may not substitute our judgment for that of the administrative body to which was delegated this governmental function.

D. Opinion of Special Term

Some of the key answers under review in this proceeding were considered and sustained by this court and by the Appellate Division in an earlier proceeding involving the same examination (Matter of Anderson v. Lang, N.Y. L.J., 12/27/61, Vol. 146, No. 122, p. 11; aff'd 15 A.D. 2d 880). The claimed intrusion of the Police Department in violation of Personnel Rules 4.4.4 and 4.4.6 was too insignificant to affect either the validity of the examination or the answers judged correct by the examiners.

This application is accordingly denied and the petition is dismissed. Settle order.

Nov. 26, 1963.

Vol. 150, No. 106, N. Y. Law Journal, Dec. 2, 1963, page 13, Col. 2 (not otherwise reported).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 547

In the Matter of the Application of

POLICARPOS RAMANTANIN,

Petitioner,

For an Order pursuant to Article 78 of the Civil Practice Law and Rules

against

DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

J. LEE RANKIN,
Corporation Counsel
of the City of New York,
Attorney for Respondent,
Municipal Building,
New York, New York 10007.

STANLEY BUCHSBAUM,
IRVING GENN,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 547

In the Matter of the Application of

POLICARPOS RAMANTANIN,

Petitioner,

For an Order pursuant to Article 78 of the Civil Practice Law and Rules

against

DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

The Issue

Petitioner brought this proceeding to challenge fourteen questions and answers on a civil service promotion examination for New York City Police Captain. The issue on this application for a writ of certiorari is whether this proceeding can be elevated to the dignity of a Federal constitutional question on a claim of violation of due process and equal protection. We maintain the contrary on the principle that the determination of merit and fitness for local public office and employment is a matter of state concern.

Facts

(1)

The petitioner, a Lieutenant in the Police Department, participated in a promotion examination for the position of Captain. He took the written part of the test (Part I) on January 21, 1961 (6).* It consisted of one hundred multiple choice questions (*id.*). The candidates were instructed to select the answer "which you believe to be the acceptable one among the choices listed" (*id.*).

The tentative key answers to the questions were published on January 30, 1961 (6). The petitioner filed protests with regard to the answers for 14 of the questions (7). The protests were rejected (8).

The passing mark for Part I of the examination was 70 (6). On December 28, 1961, petitioner was informed that he had received the failing mark of 64.6 (9).

The petition alleges generally that the examination used faulty and unclear language (7-8, 9-10). It quotes each of the challenged questions together with its key answer and the answer selected by the petitioner, and it includes an explanation of why the petitioner believes his answer was appropriate (13-46).

The petition also alleges that representatives of the Personnel Department met with representatives of the Police Department on January 27, 1961, to review and discuss the answers prior to publication (12). As a result Question 61 was deleted (*id.*). It alleges that this meeting vio-

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* Unless otherwise noted, numbers in parentheses refer to pages of the Record on Appeal in the Appellate Division of the New York Supreme Court.

lated Personnel Rule 4.4.4, and that the violation of the rule denied the petitioner the equal protection of the laws (12-13).

(2)

The answer is supported by an affidavit of Theodore H. Lang, the then Personnel Director (51-55). In this affidavit he states that on January 27, 1961 (six days after the examination was given), a representative of the Civil Service Commission met with a representative of the Police Department for the purpose of reviewing and discussing the tentative key answers prior to their publication (52). For the most part, the police representative agreed that they were correct, but he called attention to a recent change in the "Uniform Crime Reports," which led to a decision that there was no correct answer to Question 61 (*id.*). [Petitioner, it should be noted, does not contest the action taken with regard to Question 61, limiting himself to urging that the consultation with police officials was improper.]

The affidavit of the Personnel Director also states that the examination instructions to "select that answer which you believe to be the acceptable one among the choices listed" means the same thing as a direction to select the most acceptable answer except that, where two answers are equally acceptable, both may be treated as correct under the instructions used here (54-55).

Annexed to the affidavit is the Personnel Department's analysis of the questions and answers protested by the petitioner (56-77).

Petitioner submitted a reply affidavit in which he advanced some further argument with respect to some of the questions on the examination (79-81). He also argued

that the instructions did not indicate to the candidate "that he must weigh each choice against the other choices in order to select that one which is the best answer" (82).

Opinion Below

Mr. Justice Hofstadter, in denying the application and dismissing the petition in the court of original jurisdiction, wrote an opinion (83-84).

The opinion first stated that the petition must fall unless it demonstrates that the refusal to adopt petitioner's answers was an abuse of discretion or was patently wrong. It stated that no such demonstration was made. It then stated that the Court may not intervene to resolve a difference of opinion when the choice of the examiner was objectively based on technical authority.

The opinion pointed out that some of the key answers under review in this proceeding had been considered and sustained in a prior case which had been reviewed by the Appellate Division.

Finally, it said that the claimed violation of Personnel Rules 4.4.4 and 4.4.6 was too insignificant to affect either the validity of the examination or the answers judged correct by the examiners.

The Appellate Division affirmed, without opinion.

The New York Court of Appeals denied permission to appeal.

ARGUMENT

There is no substantial Federal question raised. The issues in the state courts were whether, in marking a Civil Service promotion examination, the Civil Service Commission of the Personnel Department had been arbitrary and capricious in selecting the answers to be marked correct and whether the plaintiff had been guilty of laches in delaying more than three years in perfecting his appeal to the intermediate appellate court.

(1)

The various contentions that there has been a violation of the equal protection and due process clauses of the Constitution are merely an attempt to elevate to a Federal constitutional issue the question of whether the Civil Service Commission acted properly in determining which answers on the civil service examination were marked as the correct ones. Plainly, this is a matter of State concern and raises no substantial Federal question.

This Court has held consistently that public employment by a State or its municipalities is a matter of local concern. *Garner* v. *Board of Public Works,* 341 U.S. 716 (1951); *Adler* v. *Board of Education,* 342 U.S. 485 (1952). An exception to this general rule is made where a State, as a condition of employment, promulgates a requirement that its members must foreswear membership in subversive organizations, without distinguishing between innocent and knowing association. *Wieman* v. *Updegraff,* 344 U.S. 183 (1952). Obviously, the instant case does not come within this exception.

There is no doubt of the right of a State to investigate competence and fitness for public employment. *Shelton* v.

Tucker, 364 U.S. 479, 485 (1960). This Court has repeatedly held that a denial by state action of a right to public office is not a denial of a right of property or of liberty secured by the due process clause. *Snowden* v. *Hughes*, 321 U.S. 1 (1944); *Cave* v. *Newell*, 246 U.S. 650 (1917); *Taylor and Marshall* v. *Beckham*, 178 U.S. 548 (1900).

In *Snowden, supra*, this Court said (321 U.S. at p. 8):

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

Petitioner's papers do not show any intentional discrimination in determining the correct key answers. The basic issue of what are the best answers to the several questions plainly cannot be raised to the dignity of a Federal constitutional question.

(2)

The lengthy delay of the petitioner in proceeding with his appeal to the Appellate Division raised a question of laches. The Article 78 proceeding was commenced April 1962 and decided by Special Term in December 1963. The petitioner served his notice of appeal on January 6, 1964. He did not perfect the appeal to the Appellate Division until September 26, 1967—more than three years and nine months later. In the meantime, the promotion list was promulgated and appointments made from it; and the list has expired.

In our brief in the Appellate Division it was argued that, in addition to the propriety of the determination on the merits, the long delay of over three years and nine months by petitioner in bringing on his appeal barred relief to the petitioner. Although the Appellate Division wrote no opinion it may well have based its determination on this ground. This laches argument was also raised in opposition to petitioner's motion for leave to appeal to the Court of Appeals.

The bar of laches is a sufficient non-federal ground to preclude an appeal to this Court. *Utley* v. *City of St. Petersburg,* 292 U.S. 106 (1934); *Preston* v. *Chicago,* 226 U.S. 447 (1913).

(3)

Petitioner contends that he was unconstitutionally denied trial by jury. It is settled that the constitutional guarantee of trial by jury in civil cases does not apply to the states. *Olesen* v. *Trust Company of Chicago,* 245 F. 2d 522 (7th Cir. 1957), cert. den. 355 U.S. 896 (1957), and cases there cited. It is also well settled that where there is no genuine issue of fact a jury trial is not required, and summary judgment may be had. *United States* v. *Strangland,* 242 F. 2d 843 (7th Cir., 1957); *Nave* v. *City of Seattle,* 68 Wash. 2d 72, 415 P. 2d 93 (1966), app. dism. 385 U.S. 450 (1967); rehearing den. 386 U.S. 929 (1967). The New York Civil Practice Law and Rules provides for summary judgment on the pleadings and papers in special proceedings against a body or officer. CPLR 409(b), 7804(f), (g).

We submit that in the instant case, summary judgment was proper because the petitioner has not raised a triable issue of fact under the applicable New York rule with re-

gard to what is a proper answer to questions on a civil service test. The rule is that the answer designated as correct will be sustained unless it is not the best answer; and that no other answer need be accepted as correct unless it and the answer designated as correct are equally acceptable. This is the test applicable under the most recent decisions. *Matter of Acosta* v. *Lang,* 13 N Y 2d 1079 (1963); *Matter of Dolan* v. *Krone,* 16 N Y 2d 917 (1965); *Matter of Cronin* v. *Lang,* 18 N Y 2d 608 (1966).

The petitioner urges, in Paragraph 13 of his petition, that a different rule applies here because the instructions directed that the candidates "select that answer which you believe to be the acceptable one among the choices selected" and did not use the terms "best answer" or "most acceptable" answer (9). His brief in the Appellate Division stated that any answer "which fits the stem of the question is acceptable and merits credit" (App. Br., p. 3). It seems plain that the instructions mean that a candidate must select the most acceptable answer or, where more than one answer is equally as good, one of those answers. No reasonable person could conclude that it means that a less acceptable answer may be selected simply because it relates to the question or, as petitioner ambiguously put it, the answer "fits the stem of the question."

CONCLUSION

The application for a writ of certiorari should be denied.

October 15, 1968.

Respectfully submitted,

J. LEE RANKIN,
Corporation Counsel of The City of New York,
Attorney for Respondent.

STANLEY BUCHSBAUM,
IRVING GENN,
of Counsel.